

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 41612-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WALTER WASHINGTON,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Steven Scott, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Walter Washington, appellant below and petitioner herein, asks this Court to accept review of the court of appeals decision designated in Part B below.

B. COURT OF APPEALS DECISION

Walter Washington seeks review of the unpublished court of appeals decision, State v. Walter Washington, Slip Op. No. 41612-0-I (filed April 19, 1999). A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Petitioner shot another person within petitioner's own apartment. At trial, petitioner testified that he acted in self-defense. During cross-examination, the prosecutor questioned petitioner on his failure to simply leave his apartment. The defense objected that there was no duty to retreat, but the court, in front of the jury, overruled that objection. The state then relied on that evidence in closing argument to suggest that petitioner was not acting in self-defense. Although the court gave a standard "no duty to retreat" instruction, did the court's

erroneous ruling in front of the jury negate the impact of that instruction and thereby deprive petitioner of a fair trial?

D. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor charged Walter Washington with attempted murder in the first degree. CP 1-4; RCW 9A.32.030(1)(a). A jury convicted him of the lesser included offense of attempted murder in the second degree. CP 111. The court imposed a standard range sentence. CP 113-18.

2. Overview of the Case<sup>1</sup>

For the past 11 years Walter Washington has had an on-again/off-again romantic relationship with Valorie Bryant. 1RP 138-40.<sup>2</sup> On January 7, 1997, Mr. Washington and Ms. Bryant moved back in

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<sup>1</sup> The facts of the case are set forth in the brief of appellant filed below.

<sup>2</sup> The verbatim report of proceedings is contained within four volumes of transcripts, some of which contained more than one day of testimony. 1RP refers to the proceedings for August 15, 19, 20 & 21. 2RP refers to the proceedings for August 25 & 27. 3RP refers to the proceedings for August 26, while 4RP refers to the proceedings for August 28, 1997.

to an apartment together. 1RP 143. Two weeks later, Mr. Washington shot and injured Ms. Bryant.

Mr. Washington was subsequently charged with attempted murder. CP 1-4. The issue at trial was self-defense.

Mr. Washington is 74 years old and suffers from asthma, arthritis and a bad leg. He weighs 122 pounds. 2RP 156, 161, 163, 165. Ms. Bryant, on the other hand, is 32 years old and, at the time of the incident, tipped the scale at 200 pounds. 1RP 138, 161. At trial, Mr. Washington explained that he fired in self-defense, and only after Ms. Bryant had picked up a butcher knife. 2RP 175-79.

The state countered that there was no knife, and even if there was, Mr. Washington's use of force was not reasonably necessary. See 4RP 261. In support of that last argument, the state cross-examined Mr. Washington on whether he had a means of escaping or exiting his apartment, rather than confronting Ms. Bryant. 2RP 217-18.

Prosecutor: *If you felt as though you were in any danger, couldn't you have gone out the door of your apartment, which is between the bedroom, the kitchen and the*

living room area?

Defense counsel: Objection. The law doesn't impose any duty to retreat.

The Court: That objection is overruled. You can ask the question. Want to ask it again.

Prosecutor: Okay.  
When you say you came out of that bedroom after getting the gun from your closet, *couldn't you have walked right out of the door there?* Isn't that the exit to that apartment?

Defendant: You want me to walk out the door naked?

Prosecutor: You had pajamas, didn't you?

Defendant: Yeah.

Prosecutor: But you didn't answer my question. *Couldn't you have walked out that door?*

Defendant: Quite naturally I could have.

2RP 217-18 (emphasis added).

Without argument, the court gave a "no duty to retreat" instruction. CP 103. Nonetheless, in reliance upon the trial court's earlier ruling, the

prosecutor again suggested that Mr. Washington's failure to exit the apartment negated self-defense.

During closing argument, the prosecutor told the jury,

He [Mr. Washington] said that he then came out of that room with the gun in hand, walked right past the exit to this apartment.

Now, mind you, even in the law there -- there is no lawful duty to retreat, but he did, if he's in any danger.

He walked right past the front door there, and what he said is that he had the gun. He told her to drop the knife.

4RP 258-59. A moment later, the prosecutor again referred to the fact that Mr. Washington "walked right past the exit to that apartment." 4RP 261-62.

### 3. Court of Appeals Ruling.

The sole issue raised on appeal was the trial court's ruling, in front of the jury and over defense objection, that the prosecutor could question Mr. Washington on his failure to leave his apartment if he felt threatened. See Brief of Appellant at 14-19. Mr. Washington argued that because the trial court overruled the objection in front of the jury, the jury would have believed



that the "no duty to retreat" instruction did not apply under these circumstances. Brief of Appellant at 17-18. The court of appeals ruled that any evidentiary error was harmless, because the court instructed the jury that there was no duty to retreat. See Slip Op at 2. The court of appeals made no attempt to address Mr. Washington's argument that the trial court's actions would have negated the impact of the court's instruction.

E. REASON WHY REVIEW SHOULD BE ACCEPTED  
THE COURT ERRED IN PERMITTING THE STATE TO CROSS-EXAMINE THE DEFENDANT ON HIS FAILURE TO RETREAT FROM HIS OWN APARTMENT.

It has long been the law in this state that a person bears no duty to retreat where he is assaulted or threatened in any place where he has a right to be. State v. Allery, 101 Wn.2d 591, 598, 692 P.2d 312 (1984). And a defendant is entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Allery, 101 Wn.2d at 598 (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)). Although a "no duty to retreat" instruction was given (CP 103), the jury would not have believed that the instruction had any application to these facts.

The jury heard defense counsel object that the cross-examination was improper because there was no duty to retreat. The jury also heard the judge overrule the objection, leading to the inescapable conclusion that Mr. Washington's failure to leave the apartment bore negatively on his claim of self-defense. Specifically, the jury might reasonably have concluded--as the judge apparently did--that

the failure to leave the apartment was relevant to a determination as to whether the use of force was really necessary. This was error, for the jury must consider the reasonableness of the defendant's actions without placing significance on the defendant's failure to retreat from a place he has a legal right to be. State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996). See also State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997) ("The jury could have concluded that self defense was never the less not applicable because flight was a reasonably effective alternative to Wooten's use of force.").

The trial court's ruling deprived Mr. Washington of his right to a fair trial because it suggested to the jury that a defendant had an obligation to avoid trouble, even if it meant fleeing one's own dwelling. This is inconsistent with this Court's decision in State v. Allery, supra. Review is appropriate, therefore, under RAP 13.4(b)(1). Further, because this misstatement of the law lessened the quantum of evidence required to convict, review is appropriate under RAP 13.4(b)(3) as well.

In recent years, this Court has issued a number of decisions clarifying the law as to self defense. This has included decisions helping to clarify the subjective standard to be used by the jury in assessing a claim of self defense,<sup>3</sup> the standard on review for determining whether a self-defense instruction is even required,<sup>4</sup> and the proper use of a "first aggressor" instruction in a self-defense case.<sup>5</sup> This Court should accept review in the current case so as to further clarify the relationship between a reasonable use of force instruction and a no duty to retreat instruction.

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<sup>3</sup> State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996).

<sup>4</sup> State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (Wash. Nov 12, 1998).

<sup>5</sup> State v. Finch, \_\_\_\_ P.2d \_\_\_\_, 1999 WL 274135 (Slip Op. 62938-2, May 06, 1999).

F. CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant his petition for review.

DATED this \_\_\_\_ day of May, 1999.  
Respectfully submitted,

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